

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF VIRGINIA
3 Charlottesville Division

4 DR. HERBERT R. PUTZ,
5 Et al.,

Civil No. 3:09cv00003

6 Plaintiffs,

7 vs.

Charlottesville, Virginia

8 MICHAEL H. GOLDEN and
9 SUZANNE C. GOLDEN,

Defendants. June 23, 2009

10 TRANSCRIPT OF HEARING
11 BEFORE THE HONORABLE B. WAUGH CRIGLER,
12 UNITED STATES MAGISTRATE JUDGE

13 APPEARANCES:

14 For the Plaintiff:

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18 For the Defendant:

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24
25 Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 THE COURT: Let the record reflect that this
2 is 3:09cv3, Herbert R. Putz, et al., versus Michael H.
3 Golden.

4 We're here to conclude the proceedings that
5 began the other day where we took some evidence and I
6 think the parties withheld argument pending an attempt
7 to resolve the matter on their own, which didn't occur.

8 I'll be happy to entertain argument.

9 I guess since there's a challenge to
10 jurisdiction and the plaintiff has the burden of proving
11 jurisdiction, I guess it's on you, Mr. Lowry.

12 MR. HOEGE: Your Honor, if I may, before we
13 begin, I think there may be two evidentiary concerns to
14 clear up from last time that have surfaced from last
15 time. I don't know if you would count this as an
16 evidentiary concern or not, relative to the French Court
17 ruling. But one would be to clarify what the French
18 Court ruled, number one. Number two is, you had asked
19 that maybe we present something that would suggest that
20 an affidavit is not contract performance.

21 THE COURT: You said you were going to argue
22 the legal effects of what had taken place. That's up to
23 you. If it's citing to cases, I mean, you certainly
24 have the right to refer to cases in your argument.

25 Do you have any objection to the ruling of

1 the Polynesian or whatever it is Court --

2 MR. LOWRY: We have a lot of objections.

3 THE COURT: -- being introduced into
4 evidence.

5 MR. LOWRY: No, I don't, and I'd like to
6 speak to that issue.

7 There's an issue between the parties as to
8 how those orders are interpreted. As to the lower
9 Court, we have only the English translation. As to the
10 appellate Court, we have both the French version and
11 certified English translation.

12 THE COURT: I'll only read one.

13 MR. LOWRY: I understand. But our opinion
14 first is how or even if the Polynesian courts ruled is
15 totally irrelevant to this jurisdictional issue.

16 THE COURT: I do question the relevance and
17 would address it in an opinion. If there's no objection
18 to having it in there, for whatever it's worth, we can
19 "Judge Turk" it and receive it for whatever it's worth
20 and it may not be worth anything.

21 MR. LOWRY: I have no objection to that.

22 THE COURT: Except for context.

23 MR. LOWRY: I have no objection to it being
24 introduced for whatever relevance it may have.

25 THE COURT: Do you want to present that, Mr.

1 Hoege?

2 MR. HOEGE: Yes, Your Honor. I'm using the
3 plaintiff's copy of these documents.

4 THE COURT: They'll be received as a joint
5 exhibit if that's okay, today.

6 MR. HOEGE: That's fine.

7 MR. LOWRY: That's fine. As a matter of
8 fact, we can give this set of exhibits.

9 THE COURT: What is that?

10 MR. LOWRY: That's the original contract.

11 THE COURT: Do you want me to receive that
12 as a collective exhibit?

13 MR. HOEGE: These are repetitive of the
14 exhibits attached to the complaint, with the exception
15 of 4 and 5.

16 THE COURT: If they're all together as part
17 of an evidentiary hearing, then we don't have to go back
18 through looking through the complaint.

19 MR. LOWRY: If there's no disagreement those
20 are valid and relevant, just put them all in as a
21 package.

22 MR. HOEGE: If I may, I think there are two
23 documents that are combined under #5 that I'd like to
24 separate out, Your Honor.

25 MR. LOWRY: If you want to call them 5 and

1 5A, I have no objection.

2 MR. HOEGE: May I confer with counsel?

3 THE COURT: Sure.

4 We're off the record.

5 (Counsel conferred).

6 (Documents handed to the Court).

7 These will be received as Exhibits 1 through
8 5A, as a joint exhibit to the evidentiary hearing.

9 (Exhibits #1, #2, #3, #4, #5 and #5A were
10 marked for identification and admitted into evidence).

11 MR. LOWRY: Yes, sir.

12 THE COURT: Now, are we ready?

13 MR. HOEGE: Yes, Your Honor.

14 THE COURT: With the understanding that
15 whatever legal effect any of this may have, I'll
16 certainly permit you to argue it.

17 MR. HOEGE: Absolutely, Your Honor.

18 THE COURT: Proceed.

19 MR. LOWRY: Just so you'll be aware of what
20 the issue is with respect to the orders, even though I
21 don't think they're relevant, I do want to point these
22 things out.

23 The parties have poured over the
24 translations. Mr. Hoege very appropriately gave me a
25 call and said he thought his reading of those orders

1 supported a position that what, in fact, had happened
2 was there was no ruling against Panonia Realty or Dr.
3 Putz, but in fact, the appellate Court had referred it
4 back to the lower Court for further proceedings, which
5 apparently never took place. I agree that that can be
6 one reading of those documents. But I also feel that
7 both the lower Court's opinion and the appellate Court's
8 opinion are subject to interpretation.

9 THE COURT: We don't have any authority to
10 interpret and compel anything of those courts.

11 MR. LOWRY: No, I understand, but to the
12 extent it may be --

13 THE COURT: Even if we have jurisdiction.

14 MR. LOWRY: But to the extent Mr. Hoege may
15 argue it's relevant in terms of what the parties were
16 obliged to do before they came here, I think that's why
17 he was interested in them coming in. I'm about to tell
18 you why I don't think it matters.

19 If it could be absolutely proved that the
20 Polynesian courts never made a decision on this issue,
21 which I think is the best possible interpretation Mr.
22 Golden can put on it, it doesn't affect anything,
23 because our case is Dr. Golden was contractually bound
24 to make a conveyance of property to Dr. Putz.

25 THE COURT: Can I ask question? There was a

1 lot of testimony about what Dr. Golden did and I was
2 under the impression that there was no debate that
3 whatever he was doing was in an effort, by his own
4 testimony, to honor the contract that he and his wife
5 both entered into.

6 MR. LOWRY: That was my understanding.

7 THE COURT: Are you claiming that he did
8 this on his own, Mr. Hoege?

9 MR. HOEGE: Your Honor, what I'm saying is
10 that he was contacted 18 years after the contract to
11 provide help in litigation.

12 THE COURT: Whether he helped or didn't
13 help, whatever he was doing was considered -- he was
14 acting for himself and his wife, I take it.

15 MR. HOEGE: He didn't testify to that.

16 THE COURT: He didn't.

17 MR. LOWRY: I thought he testified actually
18 on questions from the Court that he did sign it, that he
19 intended it to be what it said.

20 THE COURT: Right.

21 MR. LOWRY: And he sent it to Virginia. To
22 me, that's the critical evidence.

23 THE COURT: My question is, where will it
24 get you if we've got jurisdiction over him and not her
25 and where it will get you if we have jurisdiction over

1 him and not her? Do you understand what I'm trying to
2 get at? It's a gap. I'm not the lawyers in the case,
3 but I notice the gap and we're here and we can either
4 close the gap or leave it where it is. It makes no
5 difference to me.

6 MR. LOWRY: I think that there's joint and
7 several liability anyway, so I think whether or not she
8 is a party before the Court is not dispositive.

9 THE COURT: I'm not answering that question.
10 The only thing I'm posing is that his testimony was his
11 testimony. There's no dispute in the record that both
12 signed the underlying contractual agreement to sell.
13 Both essentially received the money and it could be
14 inferred that he was acting on behalf of both. It might
15 not be, but it could be. If it's not, the best you're
16 going to get is we've got jurisdiction over him and not
17 over her and the worst y'all are going to get is we've
18 got jurisdiction over him and not over her. And it
19 would probably be best to say we either have it over
20 both or neither. But I can't compel that stipulation.

21 Do you understand where I'm coming from?

22 MR. LOWRY: I do understand where you're
23 coming from.

24 MR. HOEGE: Yes, Your Honor.

25 THE COURT: Again, I'm only taking the facts

1 that are presented to me. If I try the case, I may lose
2 it.

3 MR. LOWRY: I understand.

4 There is some confusion in that the original
5 agreement was between Michael Golden and Herbert Putz.
6 The addendum says Michael Golden and Susan Golden and
7 Mr. Putz. I agree that that leads to some confusion, but
8 at the very least, under the original agreement, it was
9 his obligation to convey the interest and if that meant
10 he had to go get his wife to sign, then he undertook
11 that contractual obligation.

12 THE COURT: And how that plays out will just
13 play out.

14 MR. LOWRY: But I thank you for raising the
15 issue.

16 So when we get back down to it, my only
17 point on the Polynesian --

18 THE COURT: I feel like the people in the
19 Star Wars ship that found safe haven in the cave that
20 was nothing but a giant monster.

21 MR. LOWRY: The mouth of the monster.

22 This case may have more complexity than the
23 dollars involved even.

24 THE COURT: That's the problem.

25 MR. LOWRY: At any rate, as it's postured

1 today before the Court, I think the only real question
2 is whether or not there was a contractual obligation on
3 the part of Dr. Golden to make the transfer --

4 THE COURT: Isn't the real question whether
5 Judge Moon's original findings need to be disturbed?

6 MR. LOWRY: That's where I'm headed.

7 THE COURT: Isn't that really where we are?

8 MR. LOWRY: Absolutely.

9 THE COURT: Either the evidence does change
10 the factual mix where I would recommend it change the
11 outcome or it doesn't change the factual mix where I'd
12 recommend he reaffirm the outcome.

13 MR. LOWRY: Yes.

14 To that end, I ought to just probably shut
15 up and sit down and hear what Mr. Hoege has to say, but
16 I will say one thing first before I do that and that is
17 this. I think the fact that Dr. Golden has admitted on
18 the stand --

19 THE COURT: He said what he said.

20 MR. LOWRY: Right. And the fact that what
21 he said was he sent it to Virginia, intended to be bound
22 by it and it was in furtherance of his obligation under
23 the contract, I believe that's all in his testimony and
24 we can all look at it, to me that ices the matter and
25 there is no reason to upset Judge Moon's opinion.

1 I'll refrain from saying anything else until
2 rebuttal.

3 MR. HOEGE: Thank you, Your Honor.

4 I'd like to pick up with just the last
5 characterization of Dr. Golden's testimony. I don't
6 believe he ever testified that he signed the affidavit
7 with the idea that it was a continuing obligation under
8 a contract that he performed under 18 years prior.

9 THE COURT: I've got his testimony written
10 down and I'm going to attempt to repeat it as honestly
11 as I can without having the transcripts of it before me.

12 MR. HOEGE: Thank you, Your Honor.

13 Your Honor, you were questioning the
14 relevance of the interpretation of the French Polynesia
15 Court ruling.

16 THE COURT: I did.

17 MR. HOEGE: For that, I would ask you to
18 start by taking a look at Judge Moon's opinion because
19 you also just phrased the question as, do we have to
20 disturb his factual findings. Two things about Judge
21 Moon's opinion. One is, he was approaching that from a
22 presumption that the factual pleadings as presented by
23 the plaintiff were true and he had to take them in the
24 light most favorable to the plaintiff because that's
25 what you do when you reach a decision on a motion for

1 lack of personal jurisdiction, motion to dismiss.

2 THE COURT: Only the jurisdictional facts.

3 MR. HOEGE: Correct.

4 We're in a separate ball game now that we
5 have an evidentiary hearing. In the evidentiary
6 hearing, they have to prove by a preponderance of the
7 evidence that jurisdiction exists. So it's a higher
8 evidentiary threshold.

9 Judge Moon then, in his opinion, keys the
10 characterization of the affidavit as contract
11 performance off of the plaintiff's representation and
12 his acceptance of the French Polynesia Court decision
13 declaring that they were not owners. That's where the
14 relevance comes from.

15 I can direct you to specific language in
16 Judge Moon's opinion if you'd like me to Your Honor.

17 THE COURT: Let me just ask you this.
18 Irrespective of whether that's the way to characterize
19 Judge Moon's opinion or not, isn't it a fact that the
20 plaintiff has never been able to receive title?

21 MR. HOEGE: There is no evidence before this
22 Court that that is the case.

23 THE COURT: Does he have title? It's
24 alleged, right?

25 MR. HOEGE: It's alleged.

1 THE COURT: And it's alleged that he's
2 attempted to get title and can't.

3 MR. HOEGE: It's alleged, but we're in an
4 evidentiary --

5 THE COURT: We're in an evidentiary hearing
6 over jurisdiction, not over the correctness of the
7 allegations of the complaint as they go to the merits of
8 the case.

9 MR. HOEGE: That's right. But part of
10 assessing the jurisdiction question is, what is the
11 nature of the contact with Virginia? I believe that
12 that's a fair statement. You directed us to look at
13 Consulting Engineering Company and apply that framework.

14 THE COURT: Only in the context, is this a
15 substantial attempt to perform? Is it an effort to
16 perform as Judge Moon construed it? Because I'm going to
17 tell you I'm not going to mess with the law that he set
18 down. I'm just not going to do it. Now, I may say that
19 his findings lacked evidentiary support and ask that he
20 revisit that, but that's all. The way that he construed
21 the law is the law. The question is how do we apply that
22 law to the facts that we have here.

23 MR. HOEGE: I agree with that.

24 So the facts flow from the plaintiff's
25 allegations. What I'm trying to reinforce here -- and

1 maybe it's best if we proceed by just taking a look
2 quickly at the French Polynesia opinions.

3 If you look at tab four -- and again, I
4 think this is important because Judge Moon, he did not
5 have access to two of these documents and they are
6 representations which are just absolutely inaccurate in
7 both the plaintiff's complaint and all the hearings to
8 this point.

9 If you look at sub four -- this is a Court
10 order -- of a date that precedes, predates the
11 affidavit, predates the affidavit. If you look to the
12 last page --

13 THE COURT: Penultimate page. It says, "we
14 determine."

15 MR. HOEGE: That's right.

16 THE COURT: "We declare."

17 MR. HOEGE: "We declare that we are without
18 jurisdiction and dismiss the parties so that they can
19 refer to a superior jurisdiction."

20 So the trial Court dismissed for lack of
21 jurisdiction.

22 THE COURT: We don't know what that means
23 under French law.

24 MR. HOEGE: I think if we follow the
25 remainder of the Court opinions, we'll see that lack of

1 jurisdiction --

2 THE COURT: If they dismiss and send it to a
3 superior Court, is it because they want the other Court
4 to entertain the matter substantively? I don't know.

5 MR. HOEGE: But this is not a ruling that
6 he's not the owner.

7 THE COURT: But it's not a ruling that he
8 gets title either, is it?

9 MR. HOEGE: No, that's correct.

10 Then if you go to sub five, Exhibit 5,
11 you'll see a French document, which I wouldn't pretend
12 to be able to define. Once you get about halfway
13 through, you'll see a page called "Findings," in
14 English.

15 THE COURT: That's under 5A?

16 MR. HOEGE: No, this is under 5.

17 THE COURT: It says for the reasons -- no.

18 MR. HOEGE: No, Your Honor. It's the page
19 immediately following the French language in tab five.

20 THE COURT: Okay.

21 MR. HOEGE: At the top right-hand corner,
22 you're looking at the word "copy." You'll see that this
23 document says, at the top, "to the president and the
24 attorneys making up the Court of Appeal." You'll see
25 that four, the SCIP, midway through the page, there's

1 the attorney for the SCIP is identified as Mr. Herman Eu
2 Claire.

3 THE COURT: Okay.

4 MR. HOEGE: You'll see on the following
5 page, Your Honor, the words "may it please the Court" at
6 the top.

7 THE COURT: I do.

8 MR. HOEGE: Which appears to be a briefing.

9 THE COURT: I don't know what it is, but it
10 says "may it please the Court."

11 MR. HOEGE: If we continue then, we can see
12 language that continues and then at the end of this
13 document that's titled "may it please the Court," you'll
14 see that the signature offered is that of Herman eu
15 Claire, the attorney for the SCIP. So the only
16 reasonable inference here is that this is the SCIP
17 briefing for the appellate Court.

18 This is important because in paragraph 18 of
19 the complaint, of the plaintiff's complaint, the Court
20 cites that document that we just read -- not the Court,
21 but the plaintiff cites that document that we just read
22 as the Court order holding that he is not the owner,
23 that he does not have title in the case or title in the
24 property.

25 THE COURT: Let me just ask you this. Is

1 this an effort to convert a personal jurisdiction
2 objection to a case or controversy objection?

3 MR. HOEGE: No, Your Honor.

4 THE COURT: I want to make sure of that.

5 MR. HOEGE: Yes, Your Honor. Absolutely we
6 are not attempting to argue the merits, but
7 unfortunately --

8 THE COURT: That wouldn't be the merits.
9 That would be subject matter jurisdiction if there's no
10 case or controversy.

11 MR. HOEGE: Yes, Your Honor.

12 THE COURT: I just wanted to make sure
13 you're not attacking the subject matter jurisdiction.

14 MR. HOEGE: We're not at this time, Your
15 Honor.

16 THE COURT: But making it curious because
17 that can be attacked at any time.

18 MR. HOEGE: Your Honor, at this time, we are
19 not. I was provided two of these documents the day of
20 the last hearing so we're just digesting it now.

21 But then the plaintiff's complaint goes on
22 to attribute to the Court order language out of the SCIP
23 attorney's briefing.

24 THE COURT: Let me ask you this and it may
25 cut through a lot of stuff and it's not that I don't

1 appreciate where you're headed.

2 Let's assume that the lower Court did
3 nothing and the appellate Court did nothing to the
4 nothing and sent it back for nothing and the parties
5 believed there was still something to do and Dr. Putz
6 called your client, Golden, and said we have something
7 to do and Golden believed he had something to do and did
8 something. Does that change Judge Moon's opinion?

9 MR. HOEGE: Yes, it does, Your Honor.

10 THE COURT: How?

11 MR. HOEGE: Because the Golden's' position
12 regarding the affidavit is that it is merely a
13 recitation of past, complete performance. There is not
14 one word in the affidavit --

15 THE COURT: Even if both sides believe
16 there's still something to do.

17 MR. HOEGE: But both sides don't believe
18 there is something left to do.

19 THE COURT: Now they dont, but it's a
20 question of then.

21 MR. HOEGE: Then he was helping with
22 litigation because he was asked to help with litigation.
23 That was purely gratuitous. He received zero benefit.

24 THE COURT: What difference does it make if
25 he's still performing under the contract?

1 MR. HOEGE: No, Your Honor.

2 THE COURT: I'm just -- not that I'm
3 disagreeing with you, but what difference does it make
4 if he has an earnest belief that he's still performing
5 under the contract?

6 MR. HOEGE: Your Honor, let me read to you
7 the language from Judge Moon's opinion.

8 THE COURT: But based on your theory, you
9 would have to show that this case is totally
10 unmeritorious and based on that, there's no jurisdiction
11 and doesn't that get the cart before the horse?

12 MR. HOEGE: No, Your Honor.

13 THE COURT: Okay. I'm hearing you.

14 MR. HOEGE: Right, Your Honor, and here's
15 why I keep raising it.

16 Page eleven of Judge Moon's opinion is a
17 conditional interpretation of the affidavit. If you
18 look four sentences up from the bottom of the page, his
19 conditional interpretation of the affidavit is if the
20 contract is to be performed, then the defendants have
21 continuing obligations. There is not a shred of
22 evidence before this Court -- I don't think the Court
23 would even have to interpret whether or not the contract
24 had ever been performed.

25 THE COURT: This is where I'm confused and

1 honestly so because if you're telling us as the District
2 Court that we have to determine the merits of whether
3 there's any performance yet to occur in order to
4 determine whether there's jurisdiction, we would never
5 have jurisdiction to determine the substantive merits of
6 performance.

7 MR. HOEGE: Right.

8 THE COURT: And when we did determine the
9 substantive merits of performance, then we'd say we
10 don't have jurisdiction, and that just seems strange.

11 MR. HOEGE: Your Honor, that's our issue
12 with Judge Moon's opinion. We didn't do that. Judge
13 Moon did that. The problem with that opinion is that --
14 I just lost my -- let me look at my language here, Your
15 Honor.

16 THE COURT: He said "if."

17 MR. HOEGE: Number one, it's conditioned on
18 a continuing obligation to perform. The second is that
19 there's this really odd representation by the plaintiffs
20 or assertion that jurisdiction does not grow from the
21 underlying contract. Remember, one of the tenants of
22 Consulting Engineering and every other specific
23 jurisdiction case is that the case or controversy arises
24 out of the minimum contacts.

25 In this case, the affidavit gives rise to

1 nothing. The contract itself --

2 THE COURT: Let me ask you this because this
3 is unbelievably interesting. Let me just ask you this.
4 Let's assume the plaintiff alleges there's a contract
5 and alleges in a simple way that the defendant, in
6 exercise of performing the contract, had contact with
7 Virginia and then there's no challenge to the -- there's
8 no -- there's a challenge to the underlying jurisdiction
9 and they can say, well, the defendant shipped X to the
10 plaintiff into Virginia. Then let's say at the end of
11 the case, the Court determines there was no contract.
12 Now, does that defeat personal jurisdiction or does
13 personal jurisdiction determine first and then you
14 determine the merits of the case on whether there's a
15 claim for breach of contract or for fraud?

16 MR. HOEGE: That's my problem with the
17 characterization of the issue now.

18 THE COURT: But then you wanted us to
19 determine that based on an interpretation of a French
20 document that I can tell you, and I'll tell the world,
21 even the Court of Appeals, I have no earthly idea what
22 that means.

23 MR. HOEGE: Absolutely, except that --

24 THE COURT: Except the allegations are he
25 was deprived of the opportunity to take title.

1 MR. HOEGE: That's right. That works fine
2 for the Goldens' position as well, Your Honor, in which
3 case you're saying I can give no credence or credibility
4 to the French court's ruling or holding.

5 THE COURT: What I'm saying is that under
6 that interpretation, the French ruling is immaterial as
7 to whether or not under the facts alleged in the
8 complaint there's jurisdiction based on the
9 jurisdictional facts that have been demonstrated at the
10 hearing. That's where I'm coming from.

11 MR. HOEGE: Yes, Your Honor.

12 THE COURT: Is it semantics? Partially. But
13 is it substance whether it comes to jurisdictional
14 issues? Yes.

15 MR. HOEGE: I don't think it's semantics at
16 all, Your Honor. In fact, this is the great issue
17 flowing from that opinion.

18 THE COURT: This one may make it to the
19 Supreme Court, over 118 or 20 or \$30,000.

20 MR. HOEGE: The issue for us, Your Honor, is
21 all of the other -- virtually all of the other personal
22 jurisdiction questions say that the case or controversy
23 flows -- every single opinion says the case or
24 controversy has to flow out of the minimum contact. In
25 this case --

1 THE COURT: No, that is not what they say.

2 MR. HOEGE: Okay. What do they say, Your
3 Honor?

4 THE COURT: They say the minimum contact
5 arises out of the case or controversy because it says if
6 you do business and have contact in the process of doing
7 business, you conferred jurisdiction on the forum Court.
8 It's just the reverse, respectfully submitted. I'm
9 respectfully suggesting that the jurisdiction over the
10 person arises out of the case or controversy that arises
11 out of the business relationship between the parties.

12 MR. HOEGE: Out of the -- the sequence is
13 correct, Your Honor. If I can, I'll just quote
14 Consulting Engineering Corporation.

15 THE COURT: Please do. Hit me hard.

16 MR. HOEGE: Second prong is whether the
17 plaintiff's claims arise out of those activities
18 directed at the state.

19 THE COURT: But see, that's only on the tail
20 ends of the context. The context is business deal
21 allegedly gone awry, with alleged consequences, out of
22 which arise activities which touch upon the state
23 sufficiently for the person who is hailed into the state
24 to have anticipated he would be sued in the state if he
25 didn't perform.

1 MR. HOEGE: I think it reaches back further
2 than that, Your Honor. We can go through Consulting
3 Engineering --

4 THE COURT: Oh, I will. I'll read it again.

5 MR. HOEGE: Because that initial formation
6 of the contract is what matters.

7 THE COURT: No, it can be either in the
8 formation or in the performance or both or because,
9 let's say the defendant comes in for anything touching
10 upon the contract and subjects themselves to the
11 jurisdiction of the Court. So the context is the
12 business arrangement out of which activity occurs that
13 creates a cause of action and out of which there is
14 conduct that touches the forum state, is the way I read
15 it.

16 Listen, I'm just an old country lawyer. I
17 may be wrong.

18 MR. HOEGE: Your Honor, I would tell you
19 that there are only two cases that are even remotely
20 close to our set of facts, which is that the contract
21 was formed with absolutely nothing to do with the forum
22 state. The party notice in the forum state --

23 THE COURT: We have Judge Wilkinson's famous
24 putrefied reindeer antler case.

25 MR. HOEGE: Do you have a copy of it, Your

1 Honor?

2 THE COURT: I don't need it. It's indelibly
3 carved in my mind.

4 MR. HOEGE: Nana v. Chung.

5 I will leave where we're at because now
6 we're talking Nana v. Chung.

7 Let me back up. So Consulting Engineering
8 Corporation has a three-prong test. The first of those
9 prongs is the extent to which the defendant purposefully
10 availed itself of the privilege of conducting activities
11 in the state.

12 THE COURT: Okay.

13 MR. HOEGE: In this case, when the contract
14 --

15 THE COURT: I don't know what I did with my
16 copy.

17 MR. HOEGE: It's Exhibit A to the actual
18 plaintiff's response, if you've got it attached to the
19 plaintiff's response and motion.

20 THE COURT: Keep going.

21 MR. HOEGE: It's that prong that the Court
22 lays out the seven or eight factors that you use to
23 determine whether or not the defendant purposefully
24 availed himself of the privilege of doing what? Of
25 conducting business under the laws of the forum state.

1 The plaintiffs had not alleged that anything at all to
2 do with the contract formation and the initial contract
3 performance had anything to do with seeking to do
4 business in Virginia on either party.

5 THE COURT: And they know they would lose if
6 that was the basis. The only basis that Judge Moon
7 utilized was that an act of performance occurred in such
8 a manner that it touched the Commonwealth of Virginia in
9 sufficient a way as to alert the defendant that they
10 would be hailed into Court.

11 MR. HOEGE: That's right.

12 THE COURT: The only way you can get around
13 that is to, one, his factual finding was wrong on
14 whether the activity occurred; or secondly, whether his
15 legal conclusion was wrong because it wasn't sufficient
16 performance to invoke the jurisdiction of the
17 Commonwealth over the defendant. To me, those are the
18 only ways that you get around that. That's why my
19 question to Mr. Lowry was, isn't it a question of
20 whether Judge Moon's findings or conclusions get
21 monkeyed with?

22 MR. HOEGE: That's right. So with respect
23 to his conclusions of law, the thing that was accepted
24 from the plaintiff's allegations and not explored in
25 terms of an evidentiary hearing were what was the

1 purpose of that affidavit and what was the intention
2 with the affidavit? With respect to that, the affidavit
3 was executed not for use in a Virginia court, not for
4 use in Virginia litigation. It was executed for use in
5 a Tahitian court, number one.

6 THE COURT: I can understand that. I
7 understand that argument and inference from the facts,
8 yes.

9 MR. HOEGE: The affidavit is not in
10 agreement amongst the parties.

11 THE COURT: It's not a separate
12 free-standing agreement.

13 MR. HOEGE: It is not a separate or
14 free-standing agreement among the parties.

15 The affidavit makes -- unlike Judge Moon's
16 conclusion based on the plaintiff's allegations, the
17 affidavit makes no promise of future performance of
18 anything.

19 THE COURT: Okay.

20 MR. HOEGE: The affidavit, in fact, merely
21 recites past, complete performance.

22 THE COURT: But that we have to draw from
23 your interpretation of the French court's documents.

24 MR. HOEGE: No, Your Honor, that's from the
25 plain language of the affidavit. Everything in the

1 affidavit is stated in the past tense and it declares
2 actual actions already taken in the past.

3 THE COURT: So you say it's only a
4 declaration of past action.

5 MR. HOEGE: Yes, Your Honor.

6 It was for use in litigation in which the
7 Goldens were not parties.

8 THE COURT: Okay.

9 MR. HOEGE: The Goldens and Dr. Putz or
10 Panonia Realty had never contracted for litigation
11 assistance, subsequent litigation assistance. There's
12 no evidence at all that anything happened with that
13 affidavit in Virginia.

14 THE COURT: Except that it was mailed to
15 Virginia and the allegation is it was received.

16 MR. HOEGE: It was received and then it was,
17 what? The allegation is, and I think it was proffered,
18 the allegation is that it was forwarded and used in
19 Tahiti. We don't know that it was even opened in
20 Virginia. There's no evidence of that. It could have
21 been received in Virginia and immediately placed in the
22 mail, forwarded to an attorney in Tahiti. The arrival
23 of the affidavit in Virginia had zero legal effect in
24 Virginia. There's no Virginia law that was triggered or
25 --

1 THE COURT: Let me ask you this. What if we
2 have this scenario? Goldens come to Virginia and get on
3 the Internet and type up something that gets sent to
4 Tahiti or French Polynesia or whatever the name of this
5 place is. It has some different names.

6 MR. HOEGE: Bora Bora.

7 MR. LOWRY: Paepaepupure.

8 THE COURT: That place.

9 And then they leave again. Would we have a
10 different case?

11 MR. HOEGE: There I would say, now we're
12 going away from the factual holdings of Judge Moon and
13 going into the legal interpretation.

14 THE COURT: Judge Moon ruled what they did
15 was partial performance that ended up being in Virginia.
16 That's what he ruled. He didn't say it fully performed.
17 He said it was an act of performance that touched the
18 Commonwealth.

19 MR. HOEGE: But all of the cases that Judge
20 Moon cites, Your Honor, were all cases where the
21 original contracts where -- number one, the original
22 contract was negotiated and formed, in part, from
23 Virginia so that --

24 THE COURT: This will be the first one
25 that's not.

1 MR. HOEGE: It would be the only one that's
2 not, Your Honor. It's unprecedented.

3 THE COURT: I think we've got some District
4 Court cases way out in Southwest Virginia where Judge
5 Williams decided these were contracts entered into in
6 other places and it's clear law he dealt with just
7 performance that touched Virginia. That's the principle
8 behind it. If you want me to look them up, I can. They
9 were in the 80's, maybe early 90's.

10 What is the date of the opinion?

11 MR. LOWRY: I've got Production Group Intern
12 v. Goldman, in 2004.

13 THE COURT: It was out in the coal fields,
14 one after another.

15 MR. LOWRY: It's in our brief, but it's 337
16 F.Supp 2d. 788.

17 THE COURT: I've been around so long I
18 remember cases by judges and not by their style.

19 MR. HOEGE: I don't know the nature of those
20 cases. The further attenuated we get though, we would
21 say, what's the design of the other party?

22 THE COURT: I thought you would come in here
23 and argue two points. First, that the conduct that was
24 engaged in was di minimus and therefore not significant,
25 not substantial, not the kind of conduct that would,

1 even if existing, would hail somebody into court; and
2 secondly, that Judge Moon's interpretation of the law
3 was wrong because he gave more significance to the
4 activity that touched Virginia than the cases give.

5 MR. HOEGE: Thank you, Your Honor. That is
6 the segue into talking about reindeer antlers.

7 THE COURT: That is the reindeer antler
8 issue.

9 MR. HOEGE: That's right.

10 The issue there, there are two issues that I
11 would add to what you're discussing, Your Honor. One is,
12 Judge Moon does not address at all the missive from W.W.
13 Volkswagen and from Nana v. Chung that it is improper to
14 consider the unilateral actions of one party in order to
15 establish jurisdiction over the other party.

16 THE COURT: Only if the unilateral actions
17 are the plaintiff because the forum's interest in the
18 plaintiff is never enough. They can be unilateral
19 actions on the parts of the defendant who's hauled into
20 Court in the forum state, but never the interest of the
21 plaintiff is enough to establish jurisdiction.

22 MR. HOEGE: That's exactly right, Your
23 Honor.

24 THE COURT: My conflicts exam over this
25 third year in law school was over this exact thing.

1 MR. HOEGE: That's Nana v. Chung. Chung,
2 who is a Virginia resident, contacted Alaska, Nana
3 Development. Alaska has nothing in the world to do with
4 Virginia. Just exactly like the Goldens have nothing in
5 the world to do with Virginia. He initiates contact with
6 them. In that case, they actually form an agreement,
7 which is unlike our case. In that case, they strike an
8 agreement, well, I'm going to purchase these reindeer
9 antlers from you. Nana says, you have to come here and
10 receive them in Nome, Alaska. So Chung goes out to
11 Nome, Alaska. They can't provide all the reindeer
12 antlers.

13 THE COURT: They're not ready.

14 MR. HOEGE: They're not ready.

15 THE COURT: They ain't been shot yet.

16 MR. HOEGE: He says, ship them back to
17 Virginia, and they come back and they're delivered,
18 spoiled.

19 In that case, the initiation in that case
20 was less than what we have here in our case and the
21 formation of the agreement was greater. In that case,
22 the Court refused to extend personal jurisdiction.

23 The line from the opinion is "the
24 significant contacts considered are those actually
25 generated by the defendant."

1 In this case, the contract was formed,
2 executed in 1987. 18 years later, Dr. Putz contacts the
3 Goldens, says, I need help with some litigation and
4 Michael Golden says, what do you want me to do and he --
5 Dr. Putz says, how about doing an affidavit? That's the
6 undisputed evidence in this case. How about you execute
7 an affidavit?

8 THE COURT: What if the affidavit had
9 worked? Would it have been considered part performance?
10 Because it would have been the event without which it
11 would not have occurred. Wouldn't it have been
12 proximate cause?

13 MR. HOEGE: If it had worked, it would not
14 be part performance because if it had worked, it would
15 have established that the performance in 1987 was whole
16 and complete. The affidavit itself --

17 THE COURT: If performance is complete, Putz
18 gets his title and y'all can't give him a title.

19 MR. HOEGE: We have no evidence he doesn't
20 have title.

21 THE COURT: He's alleged he has it. That's
22 all he needs to be on the substantive issue. In all
23 deference, I am not going to mix the substantive claim
24 with the issue of jurisdiction except to the extent that
25 context forms exactly where we are and whether this is

1 part performance. Now, the truth is either this is part
2 performance on the facts that are here or it's not and
3 it's either part performance because factually it is so
4 or because under the case law, it's sufficient part
5 performance to invoke the jurisdiction of the Court.

6 MR. HOEGE: And to your point earlier, we
7 would say, in the alternative, we would say first, it's
8 not part performance. In the alternative, it doesn't
9 rise to the level. Nana v. Chung and Volkswagen, as
10 well, all go to the fact that Dr. Putz drafted the
11 affidavit, he contacted the Goldens, he directed the
12 Goldens send it to Virginia and then in the end --

13 THE COURT: We have Golden's testimony that
14 he did it of his own free will, nothing compelled him,
15 nobody held a gun to his head. He did it to help.

16 MR. HOEGE: Yes, Your Honor, which is
17 exactly the case in Nana v. Chung. They had a business
18 deal in that case.

19 THE COURT: I'm not going to agree that Nana
20 v. Chung -- it is certainly decisional authority that
21 applies, but whether it controls the outcome here is a
22 different matter. It certainly applies, but whether it
23 controls the outcome is a different matter.

24 MR. HOEGE: Right. I guess the reason I'm
25 using it so much is --

1 THE COURT: It's your best case.

2 MR. HOEGE: The facts are very similar to
3 our case.

4 THE COURT: It's your best case. That's why
5 I told her to get it the minute I got off the bench.

6 MR. HOEGE: Yes, Your Honor.

7 So unlike Nana v. Chung where personal
8 jurisdiction was not extended and which, by the way, is
9 not addressed in Judge Moon's opinion --

10 THE COURT: But if he's right, he's right
11 and if he's not, I have to tell him.

12 MR. HOEGE: So we're asking that you attach
13 a reindeer antler to your recommendation to him, Your
14 Honor.

15 THE COURT: It won't be putrefied, though.

16 Let me hear from Mr. Lowry for a moment.
17 You've made your points.

18 MR. LOWRY: I have the greatest affection
19 and admiration for Mr. Hoege and I think he argues hard
20 and forcefully, but I think he overlooks some things in
21 both Judge Moon's opinion and in case law.

22 First of all, in saying that --

23 THE COURT: It is hard to reverse a district
24 judge from below.

25 MR. LOWRY: It is. That's really manning

1 up.

2 THE COURT: I've done it twice.

3 MR. LOWRY: In Production Group, which is
4 the case I was talking about which comes out of the --
5 it might be out of the Eastern District -- yeah, it's an
6 Eastern District case, 2004 case, cited in our brief.
7 Here's the quote. "The settled principle that the due
8 process analysis includes contract performance activity
9 not specifically related to the breach, coupled with the
10 settled principle that the Virginia General Assembly
11 intended the long-arm statute to reach to the limits of
12 due process compels the conclusion that 'arising from'
13 should be broadly construed to mean 'related to' so as
14 to include within transacting business any contract
15 performance activity in the forum, even if not directly
16 related to the alleged brief."

17 THE COURT: Let me just say this. If Judge
18 Moon was right, I will tell you this is a case at the
19 limits of due process.

20 MR. LOWRY: It may well be. We're not
21 saying there was a flood of activity. We're saying
22 there was a single act and fortunately for our case,
23 Virginia is a single act, minimum contact, di minimus
24 state arising out of.

25 In looking at what Judge Moon had to say

1 beginning back at page eight, I'm going to read a little
2 bit, with your permission.

3 THE COURT: He's piling on. Do you throw a
4 red flag?

5 MR. LOWRY: "After these factors, I find that
6 the defendant transacted business in Virginia sufficient
7 to satisfy long-arm statute and requirement of due
8 process. The affidavit executed by Mr. Golden in
9 Washington and transmitted to Dr. Putz in Virginia is a
10 legal statement affirming the existence of the contract
11 and defendant's intention to perform in accordance with
12 the terms of the contract. The allegations in the
13 complaint indicate that the contract remains to be
14 performed. If the contract is in fact performed, it
15 appears that it will be partly performed in Virginia,
16 which is another grounds for your minimum contact."

17 Even if there had been an affidavit sent
18 here, if the Court finds, as he did, that to perform the
19 contract was going to have a nexus with Virginia, that's
20 a separate basis for finding jurisdiction in the case.

21 He found both.

22 THE COURT: But we don't have any evidence
23 of that.

24 MR. LOWRY: We do in the sense that --

25 THE COURT: Of that alternative.

1 MR. LOWRY: I think we do in the sense that
2 the party to whom the transfer has to be made is in
3 Virginia and, therefore, it has to come to him in
4 Virginia unless he's going to travel somewhere else.

5 THE COURT: Can't it just be recorded right
6 there in whatever you want to call it, in that place?

7 MR. LOWRY: Yes, it can be recorded in that
8 place.

9 THE COURT: Even if it never comes to him
10 physically, right?

11 MR. LOWRY: I don't know.

12 THE COURT: Neither do I.

13 MR. LOWRY: I won't stretch beyond that.

14 THE COURT: I know it doesn't have to be in
15 Virginia. You don't have to have the deed ever come to
16 the owner for performance to have been complete.

17 MR. LOWRY: That's certainly true in
18 Virginia, although I do know in some countries, you do
19 have to hold your title in your hands and I don't know
20 about French Polynesia.

21 Then over at page eleven when he's wrapping
22 up, he's stating, "defendant's purposefully directed
23 their activity toward Virginia and established
24 sufficient minimum contact such as they reasonably could
25 have anticipated being sued in a Virginia court by a

1 Virginia citizen and resident over a contractual
2 obligation that allegedly remains unfilled and if
3 performed will require at least partial performance in
4 Virginia. Under due process principles, personal
5 jurisdiction may be conferred for a specific cause of
6 action not only by the acts giving rise to the claim,
7 but by acts related to the claim itself."

8 Then he cites Burger King and Precepts
9 Medical Products v. Klus.

10 THE COURT: That's Judge Moon.

11 MR. LOWRY: That's Judge Moon's opinion. He
12 also cites Production Group, which I just read to you
13 from.

14 THE COURT: That's the Eastern District
15 case.

16 MR. LOWRY: "Where the defendant has created
17 continuing obligations between himself and residents of
18 the forum, he manifestly has availed himself of the
19 privilege of conducting business there," and that's a
20 quote from Production Group Intern.

21 He did not limit and focus his decision on
22 what the Court in Polynesia had to say. For purposes of
23 my argument right there, let's assume the Court in
24 Polynesia did not rule one way or the other because at
25 best, that's all they did, even under their

1 interpretation. They just said you'll have to do
2 something more, go back to court. So if they didn't
3 ever rule on anything -- and I will tell you after
4 having read the translation, his interpretation of it is
5 as credible as my interpretation of it.

6 THE COURT: You're talking about Mr.
7 Hoege's. Yes, I agree.

8 MR. LOWRY: I could clearly be wrong on
9 that, but I clearly believe it doesn't make a bit of
10 difference because that's not the issue.

11 THE COURT: Let me ask you this. Both of
12 y'all think about this. What if the French Polynesia
13 Court just dismissed the case and said y'all work it
14 out, we're not going to touch it because there's enough
15 patronage down there to sink a ship. They think SCIP
16 won't do anything.

17 MR. LOWRY: Under their interpretation of
18 the rulings that's where we're at because --

19 THE COURT: Not adding on the patronage
20 thing.

21 MR. LOWRY: Under their interpretation of
22 the ruling, the lower court said "I don't have
23 jurisdiction," but they also said "I dismiss Panonia's
24 claim." The upper court, under their interpretation,
25 said "you did have jurisdiction. So we're quashing your

1 order." Under their interpretation, nothing happened
2 after that. So we're really at what you just posited
3 there. If they're right, there's no ruling by the
4 Polynesian courts, one way or the other on this issue,
5 but there is SCIP's saying we don't recognize the
6 transfer. That was a part of the proffer. We're at a
7 jurisdictional stage and I think the question before the
8 Court is this: Did Dr. Golden voluntarily, pursuant to
9 his obligation under the contract, send an affidavit to
10 Virginia? Period. End of inquiry, as far as I'm
11 concerned.

12 THE COURT: Mr. Hoege?

13 MR. HOEGE: I've got a bunch of things to
14 fire back, Your Honor. I will pick up with that with
15 respect to the proffer because the assertion is that
16 there's evidence that the SCIP refused to allow the
17 transfer.

18 THE COURT: The one thing we're not going to
19 do is receive a proffer by agreement. I understand where
20 your disagreement came and then to try to change what
21 the proffer is. It's going to be accepted. We've got
22 to go to what the proffer is except as to the testimony
23 of Dr. Golden with respect to the events surrounding his
24 execution and mailing of the affidavit to Dr. Putz.
25 That was the only place where y'all disagreed.

1 MR. HOEGE: Your Honor, respectfully, on the
2 day of the hearing, I was handed three documents, one of
3 which I'd seen before because it was Exhibit D of the
4 complaint. The other two were the book end orders in the
5 Polynesian Court. That caused me to read all three
6 documents together. I accepted on behalf of the Goldens
7 the proffer that SCIP refused to recognize title based
8 on the fact that there is a representation in the
9 complaint that the Court made factual findings that the
10 SCIP had refused title. We came here today and I
11 believe I've shown where that representation was false.
12 I'm not saying knowingly so. I'm not saying anything
13 like that, but that is not the case. So I accepted it
14 based on the documents that I had when we started the
15 proffer.

16 Now it may be that that's determined to be
17 irrelevant, but I believe that -- I just bring it up
18 because Mr. Lowry just said it's part of the proffer
19 that the SCIP denied it and I'm just clarifying I
20 accepted that proffer based on a misrepresentation on
21 the plaintiff's complaint.

22 MR. LOWRY: If the Court wants me to put Dr.
23 Putz on the stand to say that SCIP refused the delivery,
24 I'll be glad to do it.

25 THE COURT: I'm not driving the case. You do

1 what you feel you have to do and he'll have to do what
2 he feels he has to do and I'll rule in a way I feel like
3 I have to rule. That's the way we've got to work this.

4 MR. HOEGE: Your Honor, I stand before you,
5 unfortunately, not being able to recall the facts of
6 Production Group. I would like to know whether or not
7 -- who the parties in Production Group are, whether or
8 not they're --

9 THE COURT: I'll read the case.

10 MR. HOEGE: Whether they're Virginia
11 companies or not.

12 I would also ask the Court to consider
13 whether or not the contract was formed at a time that
14 the companies were -- at least one of the companies was
15 a resident of Virginia because that is not the case and
16 our contacts are di minimus because the entire contract
17 formation and the entire contract execution minus the
18 performance rather, minus the allegations that the
19 affidavit might be part performance, was conducted while
20 none of the parties had anything at all to do with
21 Virginia and there was zero contact with Virginia.

22 I understand we're reading these principles
23 extracted from cases, but in the end, you have to apply
24 the facts to that law. So Production Group, I would
25 suspect, has greater contacts than our contacts in our

1 case, than the present case.

2 Three other points, Your Honor.

3 First, the affidavit evidences zero
4 intention. There is no evidence that Mr. Golden
5 intended to do any business at all in Virginia by
6 executing the affidavit.

7 THE COURT: The finding of Judge Moon was
8 simply this. The execution of the affidavit in
9 Washington sent to Virginia was the act of performance.
10 The performance was sending it to Dr. Putz who, in turn,
11 according to what Judge Moon knew then and actually
12 according to the evidence here, was intended to go
13 somewhere else.

14 MR. HOEGE: That's right.

15 THE COURT: There's no dispute over that,
16 Mr. Hoege.

17 MR. HOEGE: That's right. But, Your Honor,
18 the reason it's important --

19 THE COURT: So his findings basically are
20 based on the facts that he perceived to exist that
21 actually do exist with respect to the actual conduct
22 that occurred.

23 MR. HOEGE: But a contact is not enough,
24 right? Again, quoting from Consulting Engineering, "the
25 defendant purposefully availed himself of the privilege

1 of conducting business under the laws of the forum
2 state."

3 THE COURT: Listen carefully. Judge Moon
4 said if those facts that he found were the preponderance
5 of the evidence, he found that to be sufficient under
6 these decisional authorities. That was his application
7 of the law to the facts. So I go back to the original
8 thing. It appears as though there's no difference from
9 the hearing from his opinion concerning what actually
10 happened. The only question now becomes whether his
11 application of the law was appropriate.

12 MR. HOEGE: Right, which is my double point
13 here.

14 THE COURT: That just narrows down my
15 decision making.

16 MR. HOEGE: Which is my double point, Your
17 Honor, which is we cannot identify and Judge Moon did
18 not address what business Dr. Golden sought to conduct
19 in Virginia, number one.

20 THE COURT: It doesn't have to. He said
21 that Dr. Golden's activity was part performance of what
22 he'd already agreed to do, according to the allegations,
23 substantive allegations in the complaint as to what the
24 contract was, as to it's failure to be completed and as
25 to what might be required of Dr. Golden in order to

1 complete the contract or be in breach.

2 MR. HOEGE: But respectfully, you just said
3 yourself, Your Honor, that by sending the affidavit to
4 Virginia, the intention -- we could call it part
5 performance, that's fine, but the part performance was
6 not to happen in Virginia.

7 THE COURT: No, there's --

8 MR. HOEGE: It was to happen in Tahiti.

9 THE COURT: That isn't what Judge Moon
10 found. Judge Moon found the contact between Washington
11 and Virginia constituted part performance. The rest of
12 it was going to happen somewhere else. Then the
13 question becomes, is that significant enough to meet due
14 process standards? That's his application to the law on
15 the facts and you disagree with that.

16 MR. HOEGE: In the facts, my second point
17 then, I'll leave that one, is that we don't know what
18 law would have been invoked, under what protection, the
19 protection of what law.

20 THE COURT: And you say that's important and
21 Mr. Lowry says it's not important because performance
22 hasn't occurred and they were trying to do everything to
23 get it to be done. Completion of the contract had not
24 occurred.

25 MR. HOEGE: The way to look at that is when

1 the affidavit arrives in Virginia, what in the world,
2 and there is no evidence, there is no law presented that
3 indicates that when that affidavit lands in Virginia, it
4 has --

5 THE COURT: Let me ask you this. What if
6 somebody contracted for the shipment of goods from St.
7 Louis, Missouri to New York City and it happens to be
8 that the route that is designed comes through the
9 Commonwealth of Virginia where there has to be a
10 transfer of the goods from one truck to another in order
11 to partially perform? Would that be sufficient to hail
12 the trucker, trucking company, into Virginia for failing
13 to fully perform the contract?

14 MR. HOEGE: If it was in the terms of the
15 contract -- well --

16 THE COURT: Let's say it wasn't. Let's just
17 say the contract says you're to get these goods from St.
18 Louis to New York, but as part of the operating
19 procedures, they have to change trucks in Virginia.

20 MR. HOEGE: Meaning the trucking company --
21 the inference from your facts, Your Honor, is that the
22 trucking company --

23 THE COURT: Your argument is that Virginia
24 was only a conduit and it wasn't a sufficient conduit to
25 constitute a contact for purposes of due process.

1 MR. HOEGE: And I'd say it's not a true
2 analogy.

3 THE COURT: That's just arguing with Judge
4 Moon's conclusion.

5 MR. HOEGE: The trucking company does
6 regular business, so the inference from your set of
7 facts is that there's this standing company that this is
8 the route it goes through.

9 THE COURT: Let's assume the company has no
10 contact with Virginia except to make a switch of the
11 trucks because it's going to switch from one truck to
12 another. I'm trying to do the conduit.

13 MR. HOEGE: So let's say that the two guys,
14 like the one truck is coming up from Florida and it just
15 so happens the most convenient place to meet is Virginia
16 and there's no other contact between the trucking
17 company and the State of Virginia, but they stop here.

18 THE COURT: Except here, the affidavit had
19 to come to Virginia because that's the only way it was
20 going to get from Putz to the court in French Polynesia.
21 We've got --

22 MR. HOEGE: I would say in your factual
23 scenario, I would say, Your Honor, that that would be
24 insufficient contact.

25 THE COURT: Your argument is that if

1 Virginia was only a conduit, it's not sufficient.
2 That's all. It's not that it didn't occur. You're not
3 arguing that it doesn't occur. You're only arguing the
4 sufficiency for due process purposes.

5 MR. HOEGE: That's right.

6 THE COURT: That's where I was when we
7 started this. You're five points to the contrary.
8 That's exactly where we wind up.

9 MR. HOEGE: If I might, Your Honor.

10 THE COURT: One more point. I've given you
11 more time than you'll get in the Court of Appeals.

12 MR. HOEGE: You directed us to consider
13 Consulting Engineering Corporation is not addressed in
14 Judge Moon's opinion. That's why I'm, again, asking you
15 to apply this law because you directed us to it.

16 The quote, after the factors about testing
17 the first prong of the three-part test for applying
18 personal jurisdiction, specific personal jurisdiction,
19 in the paragraph, the first full paragraph on page
20 eight, the opinion says, "because the defendant's
21 activities are shielded by the benefits and protections
22 of the forum's laws, it is presumptively not
23 unreasonable to require him to submit to the burdens of
24 litigation in that forum as well," and they're quoting
25 Burger King.

1 In this case, again, nothing about the
2 affidavit -- this is the conduit argument, and I'm
3 trying to go beyond your factual conclusion that the
4 conduit is insufficient and reach the application of the
5 law here, which is to say, please consider the fact that
6 there are no Virginia laws that protect or shield the
7 Goldens, vis-a-vis this affidavit.

8 THE COURT: Look. Here's what Consulting
9 Engineer says. Here are the factors.

10 One, whether the defendant maintains offices
11 or agents in the forum state.

12 Answer: No.

13 Whether the defendant owns property in the
14 forum state.

15 Answer: No.

16 Whether the defendant reached into the forum
17 state to solicit or initiate business.

18 Answer: No.

19 Whether the defendant deliberately engaged
20 in significant or long term business activities in the
21 forum state.

22 There is a question mark there because it's
23 whether there was a deliberate engagement in significant
24 activity. So there's a question mark there. That's one
25 that we have to answer.

1 Next, whether the parties contractually
2 agreed that the law of the forum state would govern the
3 disputes; no.

4 Next, whether the defendant made in person
5 contact with the residents of the forum in the forum
6 state regarding the business relationship.

7 Question mark; affidavit.

8 Third, the nature and quality and extent of
9 the parties' communication about the business being
10 instructed.

11 I had a question there.

12 And finally, whether the performance of
13 contractual duties was to occur within the forum state.

14 That's where Judge Moon came down. He said
15 that's a yes. That was the factor that tipped the
16 scales. There was the performance of contractual duties
17 within the forum state.

18 MR. LOWRY: And there was contact between
19 the parties.

20 THE COURT: And there was contact between
21 the parties that occurred in the forum state.

22 MR. HOEGE: If I may, Your Honor, the
23 contact is in person contact, the last bullet on that
24 page.

25 THE COURT: And that's no.

1 MR. HOEGE: That's a no. I want to be clear
2 on that.

3 THE COURT: But deliberately engage in
4 significant activities, and that's the other question.
5 Was this significant activity? Those are the question
6 marks. That's why I asked you to consider that case.
7 It just lays out all of the factors.

8 MR. LOWRY: I get the last word?

9 THE COURT: You have the burden and this is
10 the last of the last words.

11 MR. LOWRY: Thank you.

12 I thought I just heard the first arguments
13 repeated all over again but I still say you've got to
14 get down to asking if anything has changed from what
15 Judge Moon said.

16 THE COURT: I know.

17 MR. LOWRY: The first thing he said was the
18 affidavit executed by Golden in Washington and
19 transmitted to Putz in Virginia is a legal statement
20 affirming the existence of the contract and defendant's
21 intention to perform in accordance with the terms of the
22 contract. That has not changed during the course of
23 this evidentiary hearing.

24 The allegations of the complaint indicate
25 that the contract remains to be performed. That has not

1 changed. If the contract is in fact performed, it
2 appears that it will be partly performed in Virginia,
3 what you were just saying from looking at the case.

4 Given Dr. Putz's citizenship and residency
5 here --

6 THE COURT: The point here is it doesn't
7 matter whether it's been performed. It's alleged not to
8 have been.

9 MR. LOWRY: That's right. The issue in the
10 case will be was it performed.

11 THE COURT: Exactly.

12 MR. LOWRY: Then in the next paragraph,
13 significantly, partial performance of a contract may
14 confer jurisdiction pursuant to the Virginia long-arm
15 statute even though the partial performance is not
16 specifically related to the alleged breach itself.

17 THE COURT: Right. That's where Judge Glen
18 Williams of the Western District wrote a series of cases
19 back in either the 80's or 90's about what is partial
20 performance and jurisdiction. There were at least two
21 or three of them.

22 MR. LOWRY: I'm not going to beat a dead
23 horse. I don't see what has changed.

24 THE COURT: That's your position.

25 MR. LOWRY: With the possible exception of

1 an interpretation of the opinion in Bora Bora, and I
2 want to say in fact for the record and to Mr. Hoege,
3 who's opinion I value highly, that the English
4 interpretations, we didn't have when we filed the
5 pleadings. We got them shortly -- our firm received
6 them shortly before the last hearing. It wasn't
7 something we were holding back on. They are subject to
8 argument as to what they mean, but I don't think they're
9 relevant to the jurisdictional hearing.

10 THE COURT: I'll render an opinion in
11 writing. It probably won't be until after the Fourth
12 Circuit judicial conference, which is this week. I will
13 get to that as soon as I can.

14 That concludes these proceedings but it
15 doesn't conclude our being here for a couple minutes.
16 These proceedings are recessed.

17
18
19 "I certify that the foregoing is a correct transcript
20 from the record of proceedings in the above-entitled
21 matter.

22
23
24 /s/ Sonia Ferris

October 23, 2009"

25

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